came liable to contribute Lim also became an employee of the plaintiff as by virtue of the proviso to paragraph (2) of the First Schedule the wages he received from the plaintiff were deemed to be within the statutory limits.

Until 5th December 1958 the word 'employee' in section 2 was defined as follows: —

"'employee' means any person, not being a person of the descriptions specified in the First Schedule to this Ordinance, who has attained the age of sixteen years and has entered into a contract of service or apprenticeship, whether written or oral and whether expressed or implied to work for an employer."

By Ordinance No. 57 of 1958 it was amended by substituting "is employed under" for "has entered into".

Paragraph (2) of the First Schedule and its proviso with which we are concerned read: —

"Any person whose wages exceed five hundred dollars a month:

Provided that where after an employee has become liable to pay contributions as provided in section 7 of this Ordinance, or would at any time but for the provisions of sub-sections (1), (1A) and (2) of section 16 thereof have become so liable, the wages of such employee at any time exceed five hundred dollars a month such employee shall not by reason only of this paragraph be deemed to have become excluded from the provisions of this Ordinance, but his wages shall for all the purposes of this Ordinance be deemed to be five hundred dollars a month;"

Section 7(1) reads: —

"Subject to the provisions of section 16 of this Ordinance, every employee and every employer of a person who is an employee within the meaning of this Ordinance shall be liable to pay monthly contributions at the rate respectively set out in the Third Schedule to this Ordinance."

The determination of the questions raised in this application depends upon the proper construction of the relevant provisions of the Ordinance and in my view the proper approach to be made in construing the meaning of words and phrases in the Ordinance should be to give effect to the purpose or intention of the Ordinance, which is to ensure financial security to an "employee" in his old age or for his future disability. The contention that Lim who was not at any time otherwise an "employee" of the plaintiff had become one because of his part-time employment with Seng Lee Co. Ltd. seems to me to be an absurdity and is certainly inconsistent with the purpose or intention of the Ordinance and the answer to it may, in my view, be found in the proper interpretation of the definition of the word "employee" in section 2.

It is common ground that Lim had attained the age of 16 years and that he had entered into a contract of service to work for an employer but in my view he was excluded from the definition of the word "employee" when he entered into the contract of service to work for Seng Lee Co. Ltd. in January, 1958, because he was then a "person whose wages" exceeded "four hundred dollars a month" and his status had continued to be so for so long as he was employed by the plaintiff. (The statutory limit was raised to $500 with effect from 1st April 1963 *vide* L.Ns 65 and 115 of 1963). It is true that Lim's monthly wages from Seng Lee Co. Ltd. were all the time below the statutory limits but his monthly wages from the plaintiff were always above the statutory limits and I see no reason why "wages" referred to in paragraph (2) of the First Schedule should not be construed to mean not only the wages Lim was getting from Seng Lee Co. Ltd. but also the wages he was concurrently getting from the plaintiff with whom he had also entered into a contract of service. As Lim had not become an "employee" when he took up employment with Seng Lee Co. Ltd., the plaintiff was not an employer of an employee within the meaning of section 7(1) and as Lim had not become liable to contribute the plaintiff was not caught by the proviso to section 2.

I accordingly find that: —

(1) Lim Itt Haw was not at any material time an employee of the plaintiff and that the plaintiff was not at any material time the employer of Lim Itt Haw within the meaning of the Employees Provident Fund Ordinance No. 21 of 1951 and the Regulations made thereunder as amended from time to time.

(2) the plaintiff is not now or at any material time has not been under any liability to pay contribution to the Employees Provident Fund in respect of the said Lim Itt Haw.

In the event I order that

(a) an account be taken of all sums paid under protest by the plaintiff to the defendant by way of contributions to the Employees Provident Fund as demanded by the defendant together with interest on such arrears of contributions similarly paid by the plaintiff to the defendant upon the demand of the defendant.

(b) the defendant do refund to the plaintiff the amount found due upon taking of the account pursuant to paragraph (a) above with six per cent. interest thereon.

I also order that the defendant pay the plaintiff the costs of this application.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Ng Ek Teong, Zain & Selvarajah.*

WONG CHEN FOH v. LO YU KYAU

[O.C.J. (Lee Hun Hoe J.) December 23, 1969]

[Kota Kinabalu — Originating Summons No. 59 of 1968]

Infants — Guardianship — Custody of children — Welfare of infants and wishes of parents — Paramount interest — Conduct of parents — Mother leaving father and subsequently living with a married man — Blameless conduct of father — Guardianship of Infants Ordinance (Sabah Cap. 54), ss. 5 & 11.

The respondent had left her husband the applicant in 1964, leaving a boy born in 1963 with him but taking with her their three daughters. In September 1964 the applicant took back the eldest daughter. In December 1964 the respondent obtained a maintenance order against the applicant for payment of maintenance for herself and the two children, but subsequently the monthly maintenance was cancelled. Sometime in 1965 she went to live with one Wong, a married

man with children of his own and she had two children by him. The applicant applied for custody of his two daughters. The respondent opposed the application on the ground that it is in the interest of the children that she should be given custody and that they had been with her for 5½ years.

Held: the court must have regard to the welfare of the children and the wishes of the parents. In this case having regard to the welfare of the infants both mental and physical the court was of the opinion that in the interest of the children they should be removed from their undesirable and unsatisfactory environment and the applicant should have the custody so that they could return to live with their natural sister and brother.

Cases referred to:-

(1) *Allen* v. *Allen* [1948] 2 All E.R. 413.

(2) *Willoughby* v. *Willoughby* [1951] P. 184.

(3) *In re L (Infants)* [1962] 1 W.L.R. 886 at pp. 890 & 891; [1962] 3 All E.R. 1.

(4) *In re S. (An Infant)* [1958] 1 All E.R. 783.

(5) *In re B. (An Infant)* [1962] 1 All E.R. 872.

(6) *J.* v. *C.* [1969] 2 W.L.R. 540, 565.

(7) *In re Thain (An Infant)* [1926] Ch. 676.

ORIGINATING SUMMONS.

Chong Thain Vun for the applicant.

Shelley Yap for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe J.: This is an application by originating summons under the Sabah Guardianship of Infants Ordinance (Cap.54) for the custody of two infants. The applicant is the proprietor of Lucky Book Store at Tawau. On 12th December, 1956 he married the respondent at Tawau according to Chinese custom. They have three daughters and a son. The eldest is a girl born in 1957 and the youngest child is a boy born in 1963. In January, 1964 when the boy was some nine months old she left the applicant taking with her the three daughters. In September, 1964, the applicant took back the eldest daughter. The respondent alleged that she left the applicant because he frequently scolded and beat her making life unbearable for her. On 16th December, 1964 she succeeded in obtaining a maintenance order against the applicant in the magistrate's court, Tawau. He was ordered to pay monthly $15 for maintenance to the respondent and $20 for each child as long as the children are with her. Subsequently the monthly maintenance for the respondent was cancelled. Sometime in 1965 she went to live with one, Wong Hock Khin, a married man with children of his own. She has two children by Wong. She stated that she married Wong long after his wife had left and remarried. She further stated that Wong is the manager of the Empress Theatre, Tawau and can support the two infants and that he has all along treated the two infants as his own.

She opposes the application and prays for the custody of the two infants. She says that it is in the interest of the two infants that she should be given custody. They have been with her for more than 5½ years. The respondent referred to a letter dated the 14th November, 1967 written by the applicant to the learned stipendiary magistrate. In the letter the applicant agreed to her having the care of the two infants and to pay $40 as maintenance for the infants. This arrangement was on the understanding that she did not re-marry. The position has since changed.

The English Guardianship of Infants Act, 1886 as amended by the Act of 1925 (Pt.9B) puts the father and the mother on an equality with reference to the custody and upbringing of their children. The Sarawak Guardianship of Infants Ordinance (Cap.93) also gives the father and the mother equal right in matters of guardianship and custody of their children. However, the Sabah Guardianship of Infants Ordinance (Cap.54) does not give the mother equal right in respect of guardianship of their children though it gives the court discretion in matter of custody. Section 5 reads: —

"The father of an infant shall ordinarily be the guardian of the infant's person and property:

Provided that the court or a judge may make such order as it or he thinks fit regarding the custody of the infant, and the right of access thereto of either parent, and may vary or discharge such order at any time on the application of either parent."

In considering the question of custody section 11 lays down that:

"The court or a judge in exercising the powers conferred by the foregoing provisions of the Ordinance, shall have regard primarily to the welfare of the infant, and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be."

The court must exercise its discretion judicially. In deciding the question of custody the welfare of the infants is the paramount consideration rather than the rights of the parents. The community to which the parties belong is another matter to be kept in mind but the court is not bound by this in exercising its discretion. In *Allen* v. *Allen*[1] it was held that the word "welfare" in section 1 of the Guardianship of Infants Act, 1925, meant physical as well as moral welfare and that merely because a woman had once committed adultery, it could not be said that she was not a fit person to have custody of the child. This was followed in *Willoughby* v. *Willoughby*.[2]

The children cannot be treated like chattel. Just because a marriage has broken up one spouse cannot with impunity consider that he or she is entitled to so many children in the absence of any agreement to custody. The conduct of the parents should be considered. Thus in *In re L (infants)*[3] where the mother admitted to the father that she had committed adultery took their two girls with her when she left the father who took out a summons to make the children the wards of the court and to have their care and control, Plowman J. awarded the care and control to the mother and held that consideration of the conduct of the mother and father must be put on one side and the matter looked simply from the point of view of what was best for the children. The Court of Appeal allowed the appeal and held that although the welfare of the children was of paramount importance it was not the sole consideration and that the judge, in putting consideration of the mother's conduct on one side had erred in principle in awarding care and control to her.

In that case in the course of his judgment Lord Denning M.R. has this to say: —

"But even if there were no chance of the mother returning at all, I do not think that she should on that account be

entitled to take the children from their father who has done no wrong. It would be exceedingly bad example if it were thought that a mother could go off with another man and then claim as of right to say: 'Oh well, they are my two little girls and I am entitled to take them with me. I can not only leave my home and break it up and leave their father, but I can take the children with me and the law will not say me nay.' It seems to me that a mother must realise that if she leaves and breaks up her home in this way she cannot as of right demand to take the children from the father. If the mother in this case were to be entitled to the children, it would follow that every guilty mother (who was otherwise a good mother) would always be entitled to them: for no stronger case for the father could be found. He has a good home for the children. He is ready to forgive his wife and have her back. All that he wishes for is her return. It is a matter of simple justice between them that he should have the care and control. Whilst the welfare of the children is the first and paramount consideration, the claims of justice cannot be overlooked."

In that same case Harman L.J. at page 891 made these observations:

"She thought she would take her children with her; she would have her paramour within reasonable distance and would in due course get a divorce and marry him and have the best of all worlds. If that sort of plea had been put forward when I was a young man at the Bar, it would have been thrown out of court in two minutes. The very idea at that time that you gave access, except under the most stringent conditions, to the adulterous spouse, was rejected with indignation. But the courts have got more humane, one may say, in that respect and very often they feel constrained, in the interests of the children, being young children, and especially in the case of girl children, to overlook the mother's failings because she alone can really offer them suitable surroundings, and there are instances where, notwithstanding that the mother has been in the wrong, she gets the care and control of the children. Indeed the matter went so far as to lead Roxburgh J. in *In re S. (An Infant)*[4] in 1958, to put forward the view that there was by then a rule that, where the children were very young, they were to be with their mother. This court rejected that view (see *In re B. (An Infant)*[5]) and said that the circumstances must be considered in every case; there was no such rule."

In his judgment Lord MacDermott in *J.* v. *C.*[6] considered that the headnote in *In re Thain*[7] suggesting that as the father was an impeachable parent his parental right stood first was misleading. He said the true ratio was contained in the last paragraph of Eve J.'s judgment at page 684 which reads: —

"As I said at the commencement of my judgment I am satisfied that the child will be as happy and well cared for in the one home as the other, and inasmuch as the rule laid down for my guidance in the exercise of this responsible jurisdiction does not state the welfare of the infant is to be the sole consideration but the paramount consideration, it necessarily contemplates the existence of other conditions, and among these the wishes of an unimpeachable parent undoubtedly stand first. It is my duty therefore to order the delivery up of this child to her father."

Different Chinese communities have different customs. In this no special custom has been established. The respondent seemed to think that when she decided to leave the matrimonial home she was entitled to the girls while the applicant was entitled to have the boy. I do not think there is any principle of law that the male infant should be with the father and the female infant should be with the mother. I consider the only principle of law in infancy cases is to look at the whole background of the case and to see where is the best place for the infant to be placed, having regard primarily to his welfare and secondly to the wishes of the parents.

The applicant has maintained the two infants since the respondent left him. In fact he also maintained the respondent until she co-habited with Wong. The respondent swore that Wong's wife had re-married. This is hearsay evidence and not admissible. The respondent also swore that she married Wong. The applicant pointed out that there has been no divorce between him and the respondent. I accept that there has been no divorce between the applicant and the respondent. There is also no evidence that Wong and his wife had been divorced, therefore, according to law she could not possibly marry Wong.

The applicant is running a business of his own. He has exercised considerable restraint. He took no step in matter of custody as he was not familiar with the process until he sought legal advice. In fact the respondent was wrong to take away the children when she left the matrimonial home since sections 5 and 3 of the Sabah Guardianship of Infants Ordinance (Cap.54) confers the right of guardianship and custody on the father. The question of discretion in matters of custody only arises when the matter comes before the court.

The respondent stated that the two infants have been with her for more than 5½ years and it would not be in their interest to give custody to the applicant. She does not seem to have any means of her own and depends on Wong. This man has three children by his wife who had left him. He has two children by the respondent. Then there are the two infants, the subject of the present proceeding. In all there are three sets of children under the care of the respondent and Wong. In such a situation she could not possibly give all her undivided attention to the two infants. Under the circumstances I do not consider the environment satisfactory to the future well-being of the infants.

I do not say the respondent is not a good mother to the two infants whom she clearly loves. In her favour is the fact that the infants had been with her for quite a period. I have to consider whether serious harm may be caused to the infants by the change of environment. But then I have also to consider the welfare of the infants, their well-being in life, not merely for the present but for the future.

Counsel for the respondent conceded that if the applicant had applied for custody earlier it would be difficult to challenge his right. But because of the lapse of time to grant him custody would not be conducive to the interest of the infants.

The primary concern of the court is the welfare of the infants. Also there are the wishes of the parents to be considered. The court has to consider and weigh all the circumstances that are of relevance in exercising its discretion. The future happiness of the infants and sense of security are always important factors. The effects of a change of custody should be given close and anxious attention.

Having regard to the welfare of the infants both moral and physical I am of the opinion that in the interest of the infants they should be removed from their present undesirable and unsatisfactory environ-

ment. It is in the interest of the infants that the applicant should have the custody so that they could return to live with their natural sister and brother. The respondent is entitled to have reasonable access. I make no order as to costs.

Application granted.

FOOK LEE BROS. v. CONSERVATOR OF FORESTS

[O.C.J. (Lee Hun Hoe J.) December 23, 1969]

[Kota Kinabalu — Civil Suit No. 169 of 1969]

Government Proceedings — Proceedings against Government of a State must be instituted against the government — Writ of summons not to be served upon government but only a notice in lieu of writ — Service on State Attorney-General — R.S.C. 1957, O.1A r.1(3) — Government Proceedings Ordinance, 1956, ss. 22 & 26.

Practice and Procedure — Government proceedings — Service of writ of summons — Irregularity — Application to set aside — Government Proceedings Ordinance, 1956 — Whether letters after service amounts to "fresh step" — R.S.C. 1957, O.72 r.2.

In this case the plaintiffs had taken out a writ of summons against the Conservator of Forests to recover the sum of $6,588 which they claimed to have paid as royalty under a mistake of law or fact. The defendant applied by motion to have the writ of summons and service of the writ set aside on the ground of irregularity.

Held: (1) as the proceedings were against the Government of a State it should have been instituted against the government;

(2) in an action against the government no writ of summons shall be served but only a notice thereof;

(3) service should have been effected on the State Attorney-General instead of the Conservator of Forests;

(4) the defendant in this case by writing two letters after the service of the writ had not taken any "fresh step" in the motion so as to preclude him from making the application to have the writ of summons and service thereof set aside.

Cases referred to:-

(1) *Wood* v. *Middleton* [1897] 1 Ch. 151.

(2) *Zalinoff* v. *Hammond* [1898] 2 Ch. 92.

(3) *The "Assunta"* [1902] P. 150.

MOTION.

Shelley Yap for the plaintiffs.

Stephen Foo for the defendant.

Lee Hun Hoe J.: This is a motion to set aside the writ of summons and the service of the same for irregularity on three grounds, namely,

"(1) that under the Government Proceedings Ordinance, 1956 the defendant has been wrongly sued by the plaintiffs,

(2) that the service of the said writ of summons does not comply with Order 1A rule 1(3) of the Rules of Supreme Court, 1957 in that a writ of summons instead of a notice thereof was served on the defendant;

(3) that the service of the said writ of summons does not comply with section 26 of the Government Proceedings Ordinance, 1956 in that the Conservator of Forests instead of the State Attorney-General was served."

The plaintiffs are timber merchants. They sued the Conservator of Forests for $6,588 which they claimed to have paid as royalty under a mistake of law or fact. It appears that the matter arose out of a criminal case whereby the plaintiffs agreed to pay the defendant compensation of $24,888 for the release of 139 pieces of logs measuring 14,640 cubic feet which had been detained. It further appears that the court refused to approve the arrangement made by the parties and instead ordered the logs to be confiscated and the plaintiffs to pay the compensation of $24,888 to the defendant which sum included royalty of $6,588 calculated at 45 cents per cubic foot on 14,640 cubic feet.

The Government Proceedings Ordinance, 1956 was extended to Sabah by the Modification of Laws (Government Proceedings and Public Authorities Protection) (Extension and Modification) Order 1965 (L.N.67 of 1965) made under section 74 of the Malaysia Act, 1963.

Section 22 of the said Ordinance reads: —

"(1) Civil proceedings by or against the Government of a State shall be instituted by or against the Government of such State.

(2) Where any civil proceedings against the Government of a State are instituted, an application may at any stage of the proceedings be made to the court by or on behalf of the Legal Adviser of such State to have the Federal Government or the Government of such other State as may be specified in the application substituted for or joined with the Government of such State as defendant to the proceedings."

It is not in dispute that royalty on timber is State revenue. By section 4(b) any claim arising out of revenue laws shall be enforceable by proceedings against the Government for that purpose. The Conservator of Forest is merely a public officer and as long as he performs his duty according to law he is deemed to be an agent of the Government. The proper person to sue is therefore the State Government.

The next ground relates to O.1A r.1(3) which reads: —

"No writ of summons shall be served upon any Government, or upon any person as representing a Government, but in any case where an action would ordinarily be commenced by writ, a writ may be issued and notice thereof in Form 1 may be served in lieu of service of the writ."

The plaintiffs had served the defendant with the writ itself instead of a notice of the writ. I think once the State Government is made a party the above provision must be complied with otherwise the service will be bad.

Lastly, it was submitted that the service should be affected on the State Attorney-General instead of the Conservator of Forests. This is so if it is an action against the State Government. Section 26 of the said Ordinance provides: —

"Without prejudice to the provisions of section 24 and section 25, all documents required to be served on the Government for the purpose of or in connection with any civil proceedings by or against the Government may be served, in the case of proceedings by or against the Federal Government, on the Attorney-General or such other officer as may be designated in that behalf, either generally or specially, by the Attorney-General by notification in the *Gazette*, and, in the case of